IN THE

Supreme Court of the United States

No. .....

S. J. GROVES & SONS COMPANY, *Petitioners,*

v.

LINDSAY C. WARREN, Comptroller General of the United States, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

THE FACTS.

The petitioner relies upon the facts as summarized in the petition. A further statement of facts in the brief will not be made except where necessary to the argument on the law.

ARGUMENT.

I.

The Respondent had Only a Ministerial Duty to Perform in Issuing a Certificate for the Amount Allowed Petitioner in the Decision of the Contracting Officer, Affirmed by the Head of the Department in Accordance with the Applicable Terms of the Contract. The Refusal of the Respondent to Perform that Ministerial Duty was Arbitrary and Capricious.

(1)

Jurisdiction of accounting officers in settlement of claims unchanged since 1817.

The respondent acted, and could act only pursuant to Section 305 of the Budget and Accounting Act of 1921 (Tit. 31, Sec. 71, U. S. Code), which originated in the Act of March 3, 1817, (3 Stat. 366) and which was carried forward as Section 236, Revised Statutes. This Act of March 3, 1817, was one reorganizing the accounting system under

the Treasury Department, where it remained until the Budget and Accounting Act of 1921, created the General Accounting Office as one of several existing independent establishments not a part of the departments of government.

This history of the accounting system is referred to in *Globe Indemnity Company* v. *United States,* 291 U. S. 476 (1934) wherein, after quoting a part of this Section 305 of the Budget and Accounting Act, the Court stated that none of the duties of the Comptrollers General thereunder "were new." A similar conclusion was reached in *Penn Bridge Company* v. *United States,* 59 Ct. Cls. 892 (1924) wherein Judge Downey, a former Comptroller of the Treasury, wrote the opinion of the court.

Using the language of this Court in the *Globe Indemnity Company* case, "Before, as after, the Budget and Accounting Act, claims against the United States might be paid from the proper appropriation upon approval of the authorized officer of the department concerned, without settlement or audit by the accounting office" and that "none of these duties imposed upon the Comptroller General were new."

Therefore, the opinions and judgments of this court as to the finality of decisions of contracting officers under similar terms of Government contracts are equally applicable, whether such opinions and judgments were before or after the Budget and Accounting Act of 1921.

(2)

Conclusive effect of decisions of contracting officers.

The leading case in this matter is that of *Kihlberg* v. *United States,* 97 U. S. 398, 403 (1878) wherein the government contract for the transportation of Army supplies provided that payment on a mileage basis would be made "according to the distance from the place of departure to the place of delivery." The Government representative and the contractor agreed that the distances or mileage should be fixed by the Chief Quartermaster which should

govern in making payment for the transportation. The contractor disagreed with the distances fixed by the designated officer but this Court stated that the terms of the agreement:

> "* * * seem to be susceptible of no other interpretation than that the action of the Chief Quartermaster, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part. The difference between his estimate of distances and the distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. *His action cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract.* * * * If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which the transportation was to be paid, disputes might have constantly arisen between the contractor and the Government, resulting in vexatious and expensive and, to the contractor oftentimes, ruinous litigation. * * *" (Italics supplied.)

This rule of the *Kihlberg* case has remained unchanged in this Court[1] and was recently applied by it in the opinion

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[1] Sweeney v. United States, 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549; *United States* v. *Gleason*, 175 U. S. 588; *United States* v. *Barlow*, 184 U. S. 588; *Ripley* v. *United States*, 223 U. S. 695); *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *Mason & Hangar Construction Company* v. *United States*, 260 U. S. 323, reaffirmed in 261 U. S. 610; *United States* v. *Northeastern Construction Company*, 260 U. S. 326.

These cases have been followed by the Court of Claims. Among others, see *Penn Bridge Company* v. *United States*, 59 Ct. Cls. 892; *McShain Company* v. *United States*, 83 Ct. Cls. 405; *Cain Company* v. *United States*, 79 Ct. Cls. 290; *Phoenix Bridge Co.* v. *United States*, 85 Ct. Cls. 626; *Rumsey* v. *United States*, 88 Ct. Cls., 254; *Dravo Corporation* v. *United States*, 93 Ct. Cls. 270.

Compare *Work* v. *Mosier*, 261 U. S. 352; *Work* v. *McAlester*, 262 U. S. 200; *Lane* v. *Hoglund*, 244 U. S. 174; *Ballinger* v. *Frost*, 216 U. S. 240; *Garfield* v. *Goldsby*, 211 U. S. 249; *Butterworth* v. *Hoe*, 112 U. S. 50; and *United States* v. *Schurz*, 102 U. S. 378.

of November 9, 1942, in *United States* v. *Callahan Walker Construction Company,* No. 65. This case concerned a dispute as to what constituted an "equitable adjustment" under a Standard Form of Government Construction Contract containing an Article 15 almost identical with the Article 15 of the contract between petitioner and the United States with the exception that in the *Callahan Walker Consruction Company* contract the authority of the contracting officer and the head of the department was limited to the decision of "disputes concerning questions of fact arising under this contract" while in the petitioner's contract the authority and jurisdiction of the contracting officer and the head of the department are not so limited, but broadly include "disputes concerning questions arising under this contract" (R-2).

The Court of Claims had given judgment for the *Callahan Walker Construction Company* that the decision of the contracting officer, which was not appealed to the head of the department concerned, as to the amount of the equitable adjustment by reason of changes under the contract, which was unacceptable to the contractor, did not constitute the decision of a dispute concerning a question of fact, as provided in the contract, but constituted a question of law. This court held otherwise and reversed the Court of Claims, stating that if the contracting officer erroneously decided the dispute, the contract provided the only avenue of relief; that is, by way of appeal to the head of the department under the terms of Article 15 thereof.

In this case, the petitioner has the decision of September 5, 1941, from the contracting officer that there were unknown subsurface conditions at the site of the work of an unusual nature differing materially from those ordinarily encountered in the work of constructing an earth-filled dam

and that the excess costs by reason thereof was $23,615.70 (R-22-31). Due to the fact that this decision was rendered by the contracting officer after the petitioner's appeal had been filed with the head of the department, under Article 15 of the contract, the Acting Secretary of the Interior rendered his decision of December 1, 1941, thereon with both the contracting officer's decisions and the appeal before him. He affirmed this decision of September 5, 1941, by the contracting officer (R-12-19). Later, with the respondent's objecting letter of March 23, 1942, before him the Acting Secretary of the Interior rendered his further decision of June 27, 1942, reaffirming the contracting officer's decision of September 5, 1941, and adhering to the conclusions stated in the prior decision of December 1, 1941 (9-12).

(3)

Both contracting officer and head of department decided in favor of Petitioner.

In addition to having decisions in his favor by both the contracting officer and the head of the department concerned, as provided in the contract, the petitioner has an Article 15 in his contract which does not limit the authority and jurisdiction of these officers to questions of fact, as did the corresponding Article 15 in the *Callahan Walker Construction Company* case.

The Court of Claims attempted by its holding in the *Callahan Walker* case to give relief to the contractor notwithstanding the adverse decision of the contracting officer by concluding that what he decided with respect to an equitable adjustment in the contract price was a question of law.

This court having concluded that the question was one of fact, was not required to decide whether the contract could have provided that the contracting officer should also decide disputes concerning questions of law arising under the contract with the same conclusiveness as he could

decide questions of fact. Petitioner's contract specifically provides that the contracting officer shall decide "all other disputes concerning questions arising under this contract" except where otherwise specifically provided. The petitioner's contract certainly includes any disputes concerning questions of law as well as of fact arising under the contract.

However, the questions which did arise under the petitioner's contract and the questions which the contracting officer decided were strictly questions of fact, namely, whether there were unknown subsurfaces or latent conditions at the site of an unusual nature differing materially from those ordinarily encountered in building earth-filled dams and if so, what amount of increase or decrease in the contract price should be made. In this respect the disputed question which arose and which was decided differed not at all from the questions which were decided in the *Kihlberg* and in the *Callahan Walker Construction Company* cases and in numerous other cases in this Court, some of which have been collected in a footnote on Page 15 of this brief.

(4)

This court has made no distinction between questions of law and questions of fact being left in the contract to decision of the contracting officer.

The case of *Mason & Hangar Company* v. *United States*, 56 Ct. Cls., 238, affirmed as *United States* v. *Mason & Hangar*, 260 U. S. 323, and upon rehearing again affirmed in 261 U. S. 610, very definitely involved a decision by a contracting officer of a question of law under a contract stipulation similar to Article 15 of petitioner's contract.[2]

The facts in that case are more fully stated in the report of the case in the Court of Claims. It there appears that

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[2] The conclusive effect of the contracting officer's decision under the contract stipulation is as if a statute had provided therefor. See *United States* v. *Babcock*, 250 U. S. 328, 331; *United States* v. *Williams*, 278 U. S. 257, *Dismukes* v. *United States*, 297 U. S. 167, 171.

the former Comptroller of the Treasury had refused to pay, or approve payment of premiums for surety bonds of cost-plus contractors during the first World War. The contract provided that the contractor should be reimbursed "its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer," including "such bonds, fire, liability and other insurance as the contracting officer may approve or require."

The said Comptroller of the Treasury held that the surety bond was one required by law (namely, the Heard Act which was involved in *United States* v. *Globe Indemnity Company*, 291 U. S. 476), not one required in the discretion of the contracting officer and that, notwithstanding the decision and approval of the contracting officer that the premium on the bond should be reimbursed to the contractor as a part of the cost under the contract, the payment could not be made. Both this Court and the Court of Claims held that the decision of the contracting officer was conclusive, this Court saying:

> "There were such decisions and settlement, and payment, in consequence of them, as we have seen. Over the effect of these the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect."

It is too clear for serious argument that the decision of the contracting officer in that case involved a question of law, not one of fact. It appears from the opinion of this Court that the conflicting contentions of law were set forth therein but the Court said:

> "We are, however, not called upon to pass upon the conflicting contentions. The contract contains other provisions that determine the liability of the Government."

The Government sought, and the Court granted a rehearing in the case and upon the rehearing the former

opinions, as well as the judgments, were affirmed in 261 U. S. 610.

In *John McShain, Inc.* v. *United States,* 88 Ct. Cls., 284, the Court of Claims attempted to apply the *Davis* case, 82 Ct. Cls., 334, as it did in the *Callahan* case, 91 Ct. Cls., 538, to reverse a decision of a contracting officer; that is, by holding that such decisions involved questions of law in the construction of the contract. This Court in *United States* v. *John McShain, Inc.,* 308 U. S. 511-512, reversed that part of the judgment below.

It thus seems clear that this Court has held that the decisions of a contracting officer as to both questions of law and of fact have the same final and conclusive effect under Government stipulations, such as we have here, even on the United States Court of Claims whose statutory jurisdiction (Tit. 28, Sec. 250, U. S. Code) is much broader than that contained in Section 305 of the Budget and Accounting Act.

On principle, there appears no basis for making any distinction between the conclusive effect of decisions of contracting officers, whether they involve questions of law or of fact or both, if the contract stipulation is not limited to decisions of questions of fact—as was done in the *Callahan Walker Construction Company* contract but which was not done in petitioner's contract.

(5)

Even if the respondent in the issuance of a certificate must decide questions of law, that is no defense to this action.

If, as we contend, the decision of the contracting officer, twice affirmed by the head of the department in this case involved simply questions of fact as to whether there were unknown latent or subsurface conditions at the site of the work within the terms of Article 4 of the contract and as to the amount thereof, the decisions were final and conclusive under Article 15 on the respondent and he had but a ministerial duty to perform.

If, as apparently held by the court below, the issuance of the certificate on which a check could be issued in payment of the amount allowed by the contracting officer and twice affirmed by the head of department, involved a question of law for the respondent to determine, the court erred in its apparent conclusion that a Government contract could not leave to the contracting officer the conclusive determination of questions of law, as petitioner's contract most certainly attempted to do. The opinions and judgments of this court in the above cited *Mason & Hangar* case in 260 U. S. 323 and 261 U. S. 610, and the *John McShain* case in 308 U. S. 520, 521 were to the contrary.

Further, the Court of Claims has upheld such decisions. In *Dravo Corporation* v. *United States,* 93 Ct. Cls., 270, decided subsequent to the *Callahan Walker* case, 91 Ct. Cls., 538, that court had before it a contract containing an Article 15 identical with the Article 15 in petitioner's case. The dispute decided by the contracting officer in the *Dravo* case was one concerning a question of law. The court upheld the decision of the contracting officer as being one in the exclusive discretion of the officer authorized by Article 15 of the contract to decide the dispute.

This Court has not upheld the defense in proceedings for a summary writ that the Government official had to interpret the law. The case of *United States ex rel Parish* v. *MacVeagh,* 214 U. S. 124, reversed 30 App. D. C., 45 arose while the accounting offices were in the Treasury Department, and it was their duty to make the settlement. The proceeding was against the Secretary as the head of the department, but it in fact involved a dispute between a Treasury Auditor and the Treasury Comptroller. In that case the Treasury was authorized and directed by a private act of Congress to settle and adjust a claim. The Auditor had allowed it but the Comptroller had refused to approve the allowance. In the summary of the argument on behalf of the Secretary, as contained in the official report of the case, it appears that an attempt was made to establish that

he had a discretionary duty to perform. Unquestionably there was a requirement to weigh some evidence and to interpret the statute. Nevertheless, this Court held that the summary writ of mandamus should be issued to require the allowance of the claim as it had been stated by the Auditor.

The case of *Roberts* v. *United States ex rel Valentine,* 176 U. S. 219, 221, was one where the summary writ of mandamus was issued against the Treasurer of the United States to require him to pay interest on certificates which had been issued by the Board of Audit of the District of Columbia. The defense was made that the duty devolving on the Treasurer was a discretionary one but the court decided that the act was ministerial:

> "* * * although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of the writ is very greatly impaired. Every executive officer, whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

The full, complete and conclusive authority of the contracting Officer and/or the head of the department to decide all disputed questions, whether of law or fact, arising under a contract, could hardly be stated more clearly and plainly than it was stated in Article 15 of this contract and that conclusive authority could not be more plainly upheld than it has been upheld in the above cited cases in this Court involving similar contract stipulations.

The duty upon the respondent to issue a certificate on which a check could be issued involved no more discretion than was involved in the case of *Kendall* v. *United States ex rel Stockes*, 12 Peters, 524, where the duty required of the Postmaster General, and enforced by mandamus, was to credit on the books of his department, for the benefit of the contractor, a balance which had been determined by another official in another department. There the books were kept in the Post Office Department, as the court pointed out. Here the certificates on which checks may be drawn in payment of claims are issued in the office of respondent.[3]

Wright v. *Ynchausti*, 272 U. S. 640, and *Minila* v. *Rosadas*, 274 U. S. 410, were both proceedings against the former auditor for the Philippine Government to require him to pay certain claims allowed by other legal authority. The statute under which this auditor operated was enacted by Congress and modeled on the Act of July 31, 1894, under which the former accounting officers of the Treasury functioned at the time the Budget and Accounting Act of 1921 became law. Notwithstanding the Auditor claimed he was exercising discretion in interpreting the law, the judgments of this Court in both of these cases supports the position of petitioner that the respondent had but a ministerial duty to perform.

(6)

There was a gross abuse of any discretion the respondent may have had in the premises.

In addition to the above cited cases of this Court as to the conclusive effect of the decisions by contracting officers of disputes arising under Government contracts containing stipulations similar to Article 15 of this contract and the two opinions of this court in the *Mason & Hangar* case as to the lack of power of the chief accounting officer over such decisions, the Court of Claims has several times reversed his settlements refusing to carry out similar deci-

[3] Compare *Lower* v. *United States ex rel Marcy*, 91 U. S. 536.

sions of contracting officers and has pointedly advised him that such action "was without legal authority" in *McShain Co.* v. *United States,* 83 Ct. Cls., 405; "was without warrant of law" in *Albina Marine Iron Works* v. *United States,* 79 Ct. Cls., 714; that the "judgment and approval" of the contracting officer was exclusive in *Sun Shipbuilding & Dry Dock Company* v. *United States,* 76 Ct. Cls., 154; and that the "General Accounting Office was without jurisdiction to consider it" in *Rumsey* v. *United States,* 88 Ct. Cls., 254. Yet the respondent ignored all of these pointed judicial utterances and is attempting to force the respondent into the Court of Claims when it must be realized by all concerned that the said court could do nothing more under the controlling cases than to enter judgment upholding the decisions of the contracting officer and the head of department in this case.

Surely these judicial utterances and warnings in similar cases to the respondent or his predecessors in Office have at least equal weight with the opinion of the Attorney General of the United States in 20 Opins. Att. Gen. 626, with which the Panama Canal Auditor—whose accounts were settled by the accounting officers of the Treasury (See Executive Order quoted on Page 754 of *Smith* v. *Jackson,* 241 Fed. 747, 777)—refused to comply because of a contrary decision by the Comptroller of the Treasury, which the Auditor claimed precluded the courts from granting the summary writ (See 241 Fed. at page 757). The controversy was brought to this Court in *Smith* v. *Jackson,* 246 U. S. 388. In affirming the grant of the summary writ of mandamus, notwithstanding the Comptroller's decision, this Court said:

> "While it is apparent that this ruling [the Attorney General's] should have put the subject at rest, obviously the misconception of the Auditor as to the nature of his powers prevented that result from being accomplished. * * *
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> "The expense of printing a voluminous record has been occasioned and the views of the Auditor have been

pressed upon us in a printed argument of more than one hundred pages. We think, however, that we need not follow or discuss that argument, as we are of the opinion that it is obvious on the face of the statement of the case that the Auditor had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General and, second, beyond all possible question to the judgments of the court below. It follows, therefore, that the prosecution of the writ of error from this court constituted a plain abuse by the Auditor of his administrative discretion. In an ordinary case the situation would be one not only justifying but making it our duty to direct the enforcement of Rule 23 as to damages."

If this were a case of first impression and if the rule had not been so uniformly upheld by this Court since the *Kihlberg* case in 1878 that the decisions of contracting officers, rendered in good faith and without fraud or collusion or gross mistake, were final and binding on all concerned, including contractors, courts, and the accounting officers of the Government and if the Court of Claims, by way of protest in its opinions at the useless work thrown upon it, had not advised the respondent's predecessors in office that refusal to carry out such decisions were without warrant of law, contrary to law, etc., there might be some excuse for the action taken by respondent in this case.

However, it is the belief of the petitioner that the time has come to end this long continued practice of the Accounting Office, as illustrated in this case, to disregard the decisions of contracting officers and heads of departments under Article 15 of this and similar Government contracts and thus save the courts useless work and both the contractors and the Government large amounts of time and expense.

In view of the vast number of both construction and supply contracts entered into during this war by the United States on the Standard Government Forms of Contracts, containing Articles similar to Article 15 in this Contract,

these burdens on the courts and on both the United States and contractors will be increased to astronomical proportions if this Court does not settle this jurisdictional dispute between the respondent and the contracting officers and/or heads of departments.

Apparently in view of the disregard of respondent of the opinions of this Court in the *Mason & Hangar Company* case, particularly, and in other cases from *Kihlberg* v. *United States,* in 1878 to the *Callahan Walker Construction Company* case in 1942 the jurisdictional dispute between respondent and contracting officers apparently can not be settled in a suit against the United States. The situation is much more serious than was the one in the above referred to in *Smith* v. *Jackson.* It is believed that it can only be settled by means of a summary rule against the respondent with imposition of costs which the Court considered in *Smith* v. *Jackson.*

II.

The Courts Have the Judicial Power to Grant the Relief Prayed for in this Case and the Relief is not Adequate Which the Petitioner Could Secure in a Suit Against the United States.

This point would seem to be established by *Miguel* v. *McCarl,* 291 U. S. 441; *McCarl* v. *Cox,* 56 App. D. C. 27, certiorari denied, 270 U. S. 652; *Baker* v. *McCarl,* 58 App. D. C. 69; *McCarl* v. *Wylly,* 5 Fed. (2nd) 897; and *Smith* v. *Jackson, supra; McCarl* v. *Halstead,* 59 App. D. C., 395; *McCarl* v. *United States ex rel Societa Liquire di Armamento,* 58 App. D. C. 319.

In each and every one of these cases a suit could have been maintained against the United States in the Court of Claims and in each and every one of the cases the respondent Comptroller General had to make a legal determination and to some extent, at least, weigh the evidence in the respective cases. But the courts granted summary relief

and save for the case of *Miguel* v. *McCarl,* the respondent Comptroller General's action was based on the above quoted Section 305 of the Budget and Accounting Act. Also, except in the *Miguel* and *di Armamento* cases the men seeking relief by means of the summary procedure were claimed by the Comptroller General to be indebted to the United States and in addition to his jurisdiction under Sec. 305 of the Budget and Accounting Act, he was required by law to superintend the collection of debts to the United States (Tit. 31, Sec. 93 U. S. Code).

In the *Miguel* case a majority of the Court could not agree to issue the summary writ against the respondent McCarl because the Finance Officer had submitted the question to the Comptroller General for decision, in accordance with statutory procedure followed by the Auditor in *Smith* v. *Jackson, supra.* The Court did, however, hold that the right of Miguel was so plainly fixed by statute as to be free from doubt and equivalent to a positive command which could not be "affected by a contrary decision of the Comptroller General," saying:

> "* * * the mandatory injunction to Coleman should issue directing a disposal of petitioner's application for pay upon the merits, unaffected by the opinion of the Comptroller General, and in conformity with the views expressed in this opinion as to the proper interpretation and application of the pertinent statutes, a writ in that form is better suited to the circumstances than that indicated by the Supreme Court of the District."

As indicating the respect which this Court considered its opinions entitled to from the Comptroller General, the Court further said in the *Miguel* case that:

> "But it is not to be supposed that upon having his attention called to our decision, the Comptroller General will care to retain possession of the voucher or that he will interfere in any way with its payment."

The legal rights of the petitioner in this case were no less certainly determined and fixed by Articles 4 and 15 of the contract and the three concurring decisions thereunder by the Acting Secretary of the Interior and the contracting officer than were the rights of Miguel determined and fixed by the applicable statutes. There is, however, this difference that the statutes in the *Miguel* case had not been repeatedly interpreted in opinions of this Court or by any other court as have the rights of contractors and the jurisdiction of contracting officers and/or heads of departments under contracts having stipulations therein similar to Article 15 of this contract.

(1)

The remedy of a suit in the Court of Claims is not adequate.

Whether it should be the law or not, the fact is that this Court and the Court of Claims have repeatedly held that the decisions of contracting officers and/or heads of departments concerned under Government contracts having articles similar to Article 15 of this contract are final and conclusive on the United States, contractors, and the courts except in instances of fraud or gross mistake and neither has been alleged by the respondent in his answer in this case.

In other words the courts have entered judgments in accordance with such decisions of contracting officers whether they were for or against the United States, thereby reversing the Comptrollers General when they had refused to carry out decisions of contracting officers and/or heads of departments which were in favor of the contractors. Presumably this long established rule of decision would be applied in this case in event suit had been or is instituted against the United States. The petitioner was not indebted to the United States and had no fear of a counter-claim being filed against it in event of such a suit as might have been done in the above referred to *Smith* v. *Jackson, McCarl* v. *Wylly, McCarl* v. *Cox, Baker* v. *McCarl* and other cases.

However, the remedy by such a suit is not adequate in this case. The petitioner completed its work under the contract in the autumn of 1939, or nearly four years ago. Approximately two of these years were consumed in securing the decisions of the contracting officer and the head of the department. While the settlement certificate issued by respondent is undated, (R-46) it was certainly subsequent to the second decision by the Acting Secretary of the Interior dated June 27, 1942 (R-9). It is alleged in the bill that this settlement is dated August 20, 1942 (-6). The bill was filed August 25, 1942. Thus at the time the bill was filed the petitioner had been delayed more than two and a half years in securing payments of its out-of-pocket expenditures because of the admittedly unknown subsurface or latent conditions at the site of the work. Even if the suit against the United States in this case could be heard while we are engaged in this war and witnesses having knowledge of the facts are not engaged in essential war work on behalf of the United States, the necessary delay of securing judgment and in securing an appropriation with which to pay the judgment and in securing a certificate from the respondent on which a check could be drawn in payment of the judgment would at least double the delay which has occurred.

Such long delays are not only a serious matter in obtaining recoupment of petitioner's out-of-pocket expenses but further expenses in substantial amounts would have to be incurred for the travel expenses and per diems of witnesses to appear before a Commissioner of the Court of Claims for the purpose of giving their testimony; expenditures would have to be made for printing the petition and briefs, and for the transcribing of the testimony before the Commissioner. Much greater time would be required of petitioner's counsel and his charges would necessarily have to be higher than if the case were determined in a summary proceeding.

(2)

Judicial power may be fully and adequately exercised on the record in the case.

The allegations in the bill of complaint, to the extent they are admitted in the answer and the three decisions by the Interior Department officials under Articles 4 and 15 of the contract and the letter of the respondent to the Secretary of the Interior as well as his settlement—all of which are contained in the record—fully and completely present the legal issue which the respondent has raised in the case as well as the disputed question of jurisdiction between the Interior Department officials, on the one side, and the respondent Comptroller General, on the other side.

The case made calls for, and the circumstances require, the exercise of judicial power as it was exercised in *Smith* v. *Jackson, Miguel* v. *McCarl, Manila* v. *Posadas, Wright* v. *Ynchausti, Roberts* v. *United States ex rel Valentine, Kendall* v. *United States ex rel Stokes, United States ex rel Parish* v. *MacVeagh,* all hereinbefore cited. Also, *Noble* v. *Union River Logging Railroad Company,* 147 U. S. 123.

III.

There is no Merit in the Position of the Respondent and in the Conclusion of the Court Below to the Effect that the Respondent Had a Discretionary Duty to Perform in the Issuance of the Certificate on Which a Check Could be Drawn in Payment of the Amount Allowed by the Contracting Officer and the Head of his Department in Accordance with the Terms of the Contract.

With all due respect to the court below and to the respondent, the latter raised the dispute and jurisdictional issue between him and the Interior Department officials when he manufactured the issue that under paragraphs 37 and 47 of the specifications (R-39-42) the respondent was entitled to no adjustment under Article 4 of the contract because of the discovery at the site of the work and below

the bottom of the test pits, dug by the Government, the unknown condition of the presence of Rhyolite unsuitable for use in constructing the dam.

Petitioner believes that the Acting Secretary of the Interior fully and completely, in his letter of June 27, 1942, (R-9-12), demolished that alleged legal issue when it was put to him in the letter of March 23, 1942, by the respondent (R-31-46). Both the contract and the specifications were drafted by the Government and in accordance with long settled rules of interpretation any uncertainties in these documents must be resolved against the Government. Also, if possible, the contract and specifications should be interpreted so as to raise no conflict in their terms.

But as the Acting Secretary pointed out in his said letter of June 27, 1942, the position of the respondent would create an uncertainty amounting to the reading out of Article 4 of the Contract the stipulation that in event unknown subsurface or latent conditions of an unusual nature are discovered at the site of the work, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character required by the contract, there would be an adjustment in the contract price.

It is admitted by the decisions of the Interior Department officials and by the statements quoted therein from their representatives on the job that the presence of Rhyolite at the site of the work was unknown to them; that the presence of Rhyolite was not a condition generally recognized as inhering in construction of earth-filled dams; and that representatives of petitioner were advised before the bid was submitted that the necessary earth for the dam would be obtained in a particular area designated by the Government Engineer to these representatives of petitioner.

The respondent would repudiate the designation of the area for the borrow pit made by the Government Engineer to petitioner's representatives before the bid was submitted and the contract entered into and would require the con-

tractor to absorb the additional costs in grubbing and clearing successive borrow pit areas, etc., when the first and succeeding ones, except the last one designated, were found to contain Rhyolite unknown to either the Government or petitioner's representatives.

In order to work such an injustice on the petitioner, the respondent would create a conflict between Article 4 of the contract and the said paragraphs 37 and 47 of the specifications and read out of the said Article 4 of the contract a stipulation placed therein for just such a situation as developed in this case. Also, in order to accomplish this, the respondent would seize and exercise the jurisdiction conferred by Articles 4 and 15 of the contract on the contracting officer and the head of the Interior Department, advised by their engineers highly trained in this character of work.

Whatever else it may be called, this action on the part of respondent can not be considered the exercise of a legal discretion, particularly in view of the many decisions of this Court and of the Court of Claims as to the binding effect of the decisions of contracting officers and/or heads of departments under corresponding stipulations in Government contracts. The petitioner believes that such action by respondent was arbitrary and capricious, as hereinbefore stated.

CONCLUSION.

Upon the whole case it is submitted that the petition for certiorari should be granted and the judgment of the court below reversed with the imposition of all costs on the respondent.

Respectfully submitted,

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April 30, 1943.